IN THE

Supreme Court of the United States

October Term, 1978

No. 78-447

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners
1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

Counsel for Petitioner

September 18, 1978

CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Statutes:

Federal Aviation Act of 1958, 49 U.S.C.

Interstate Commerce Act, 49 U.S.C.

Judiciary and Judicial Procedure Act, 28 U.S.C.

Miscellaneous:

Page

IN THE

Supreme Court of the United States

October Term, 1978

No. _____

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the National Association of Regulatory Utility Commissioners (NARUC) respectfully prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on June 20, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported, appears at Appendix B to this petition. The Court of Appeals affirmed the Opinion and Order of the Civil Aeronautics Board (CAB or Commission), Order 76-7-23 (Docket 24779) of July 7, 1976, which appears at Appendix C.[1]

[1]Petitioner NARUC has joined with petitioner California Public Utilities Commission in preparing a Joint Appendix which has been separately bound in a companion volume, hereinafter cited as "App."

JURISDICTION

The judgement of the Court of Appeals was entered on June 20, 1978. This petition is filed less than 90 days from that date pursuant to Supreme Court Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit, in affirming an order of the CAB which preempted State rate regulation of intrastate fares of Federally-certificated airlines, has misconstrued the Federal Aviation Act in total disregard of its plain language and accepted interpretation?

2. Whether the United States Court of Appeals for the District of Columbia Circuit, in holding that the CAB has *Shreveport* authority *[Houston and Texas Ry. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914)] over the intrastate rates of Federally-certificated airlines, has misapplied the *Shreveport* doctrine and has thus extended CAB jurisdiction far beyond that intended by Congress?

3. Whether the United States Court of Appeals for the District of Columbia Circuit's adoption of the remedy of last recourse — preemption — was in error since less harsh and more equitable remedies were available as a solution to the alleged unjust discrimination?

STATUTORY PROVISIONS INVOLVED

1. Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*

2. Interstate Commerce Act, as amended, 49 U.S.C. § 1 *et seq.*

Relevant sections of the statutes are set out in App. J and K.

STATEMENT OF THE CASE

The genesis of this case lies with the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.* In that Act (as well as in its predecessor, the Civil Aeronautics Act of 1938), Congress envisioned a dual regulatory structure for the economic regulation of air transportation. Certification of carriers and regulation of their rates for interstate air transportation has historically been delegated to the Federal Civil Aeronautics Board, while the authority to regulate intrastate air transportation was left with the States.

Pursuant to this Congressionally mandated demarcation of authority, the California Public Utilities Commission (California PUC), regulates the fares of non-Federally certificated carriers operating exclusively within California (e.g. Air California, PSA), and it exercises jurisdiction over the intrastate fares of Federally-certificated carriers within the borders of California (e.g., United Air Lines, Western Air Lines). It is the latter form of regulation which the CAB has preempted herein.

In Texas, the Texas Aeronautics Commission (TAC) licenses intrastate carriers, but does not regulate the fares charged by the intrastate carrier, nor does it regulate the intrastate fares charged by the Federally-certificated carriers. Thus, in Texas, the intrastate and interstate carriers have been free to raise or lower their intrastate fares at will.

On September 28, 1971, Ralph Nader and the Aviation Consumer Action Project (ACAP) filed a complaint with the CAB [Docket No. 23859] in which they alleged that the differences charged by United Air Lines to interstate and intrastate passengers in the Los Angeles-San Francisco

market were unjustly discriminatory against interstate passengers.

Mr. Nader's complaint arose in connection with separate flights on which he was a passenger from Washington, D.C. to San Francisco, where he conducted business; from San Francisco to Los Angeles, where he also conducted business; and from Los Angeles back to Washington, D.C. The total fare charged by United for this airline trip was $345, which included a $35 charge for the San Francisco to Los Angeles segment. While enroute from San Francisco, Mr. Nader discovered that other intrastate passengers were paying approximately half his $35 fare for the same flight.

On September 25, 1972, the CAB dismissed the Nader-ACAP complaint and opened an investigation into the complainants' allegations. In its Order of Investigation (Order 72-9-90, App. E), the CAB found, *inter alia*, that differences did exist between interstate and intrastate fares in numerous intra-California markets and in several intra-Texas markets. Upon making this finding, the Board ordered an investigation to determine whether the differences in these fares were unjustly discriminatory or otherwise unlawful.

After the submission of briefs, a hearing was held before Administrative Law Judge William H. Dapper. In his Initial Decision, served on April 23, 1974 (App. F), Judge Dapper found that the differences between interstate and intrastate fares charged by the CAB-certificated carriers in California and Texas markets were *not* unjustly discriminatory, unduly preferential, unduly prejudicial or otherwise unlawful. Such differences, he determined, were justified by transportation-related factors, especially by the need to meet the competitive prices of State-certificated carriers.

Nader and ACAP thereupon petitioned the CAB for discretionary review of the Initial Decision. The Board

granted review [Order 75-3-2, March 3, 1975 (App. G)] with respect to the one primary issue of whether the difference in fares, in the markets in question, resulted in unjust discrimination against interstate passengers.

By order of the Board, initial and reply briefs concerning the Petition for Review were filed. On July 7, 1976, in Order 76-7-23 (App. C) the CAB reversed Administrative Law Judge Dapper's decision and held that the differences between the interstate and intrastate fares charged by the CAB-certificated carriers in California and Texas markets were unjustly discriminatory. The CAB concluded that the discrimination could be corrected only by eliminating the fare differentials, and ordered the establishment of a single level of fares applicable to both interstate and intrastate passengers moving in the markets in question. Such fares were to be computed on the basis of Federal formulas. The Board further ordered that the new tariffs be filed on not less than 60 days notice and be established within 90 days of the order. With proper justification, the CAB ordered that the carriers could reduce fares to meet competition from intrastate carriers.

The basis for the CAB's decision was that the existing fare system allowed an interstate passenger who is knowledgeable about the lower intrastate fares for a segment of his journey to take advantage of the situation and purchase separate tickets accordingly. An unknowledgeable interstate traveler would pay the higher interstate charge for his entire trip. Since "the carriers are unable or unwilling to distinguish all interstate passengers moving over the intrastate segment," then unjust discrimination exists because "limited groups of persons are receiving a more favorable price than others purchasing the same service." Order 76-7-23 (App. C, at 27). The Board argued that State agency orders cannot compel the

maintenance of differences in fares, citing the *Shreveport* case.[2]

Pursuant to a petition filed by Western Air Lines, the CAB decided to defer the tariff filing date until further order of the Board. Order 76-8-15, August 3, 1976. The time for filing petitions for reconsideration of Order 76-7-23 was also extended to August 11, 1976.

Several petitions for reconsideration were filed, including a joint petition by the NARUC and the California PUC.

On October 29, 1976, in Order 76-10-138 (App. D), the CAB denied the petitions for reconsideration and required new tariffs to be filed and implemented by February 1, 1977.

The California PUC, the NARUC, and the TAC thereupon filed petitions for review with the Court of Appeals for the District of Columbia Circuit in Docket Nos. 76-2117, 76-2123 and 76-2155 respectively.

By Order 77-1-137 (App. I), adopted on January 24, 1977, the Board granted a partial stay of Order 76-7-23 insofar as that order required Federally-certificated carriers to establish a single fare level constructed in accordance with Federal fare formulas in markets where there is no competition from intrastate carriers. Where there is such competition, fares were expected to be established at the State approved level.

By order dated February 9, 1977, the Court of Appeals consolidated the three pending appeals and established a briefing schedule for consideration on the merits.

After briefing, oral argument was heard on February 17, 1978.

---

[2]*Houston and Texas Ry. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914).

In a decision entered on June 20, 1978 (App. B), the Court of Appeals affirmed the CAB's order. In upholding CAB ouster of valid State jurisdiction, the Court first held that there was substantial evidence upon which the Board could find unjust discrimination. After making this finding, the Court, in a precedent-setting opinion, ruled for the first time that the CAB does have *Shreveport*-type authority allowing the Board to preempt State rate-making efforts upon a finding of unjust discrimination.

Dismissing petitioners allegations of "locality discrimination" against monopoly market intrastate passengers (those markets having no effective competition with CAB-certificated airlines), the Court of Appeals affirmed the CAB's remedy as being fully within the Board's authority. In so doing, the Court of Appeals affirmed the Board's attempted destruction of the pervasive dual regulatory structure authorized by the Federal Aviation Act.

REASONS FOR GRANTING CERTIORARI

A writ of certiorari should issue in this case for several independent reasons. The CAB's order, as affirmed by the United States Court of Appeals for the District of Columbia Circuit, represents a radical departure from well-established jurisdictional limitations in the Federal Aviation Act. The decisions below are in direct conflict with the plain language of the Federal Aviation Act which explicitly limits economic regulation by the CAB to interstate and foreign travel and which specifically mandates a dual regulatory structure for the regulation of airline transportation. [49 U.S.C. §§ 1301(10), 1301(21), 1301(22), 1301(23), 1302, 1371, 1374 and 1482]. Further, the decision of the Court of Appeals is in direct conflict with case law interpreting the limits of CAB jurisdiction which has constantly recognized this dual regulatory structure. *People v.*

Western Air Lines, Inc., 268 P.2d 723 (Calif. 1954), *appeal dismissed for want of a substantial federal question, Western Air Lines v. California*, 348 U.S. 859, 99 L.Ed. 677, 75 S.Ct. 87 (1954); *Texas International Airlines, Inc. v. CAB*, 473 F.2d 1150 (D.C. Cir. 1972). Thus, the instant case involves a very important question of Federal law which has not been, but should be settled by this Court.

In addition, the Court of Appeals, in affirming CAB jurisdiction over intrastate rates of Federally-certificated airlines under the authority of 49 U.S.C. § 1374(b) and *Houston and Texas Ry. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914) [the *Shreveport* case] has totally misconstrued the plain language of Section 1374(b) and the historic application of the *Shreveport* doctrine. The issue of whether or not the CAB has *Shreveport* authority was one of first impression in the Court below. The decision rendered by the Court of Appeals is in direct conflict with this Court's consistent rulings as to the applicability of the *Shreveport* doctrine and thus review is sorely needed to correct the lower court's erroneous holding.

Finally, this Court should grant review of the decision below because the Court of Appeal's ruling is in direct conflict with decisions of this Court that hold that a Federal authority may not preempt State regulation unless the nature of the regulated subject matter permits no other conclusion or the Congress has unmistakably so ordained. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 10 L.Ed.2d 248, 83 S.Ct. 1210 (1963); *Head v. New Mexico Board*, 374 U.S. 424, 10 L.Ed. 983, 83 S.Ct. 1759 (1963). Many alternative remedies were available for both the CAB and the Court of Appeals rather than the preemption of valid State authority. Yet, rather than choose the most equitable and fair remedy, the CAB and the Court of Appeals have violated all established principles of law and preempted State regulation.

I. THE LOWER COURT HAS FUNDAMENTALLY MISCONSTRUED THE FEDERAL AVIATION ACT IN TOTAL DISREGARD OF ITS PLAIN LANGUAGE AND ACCEPTED INTERPRETATION THUS CREATING A VERY IMPORTANT QUESTION OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT

The Federal Aviation Act of 1958 (49 U.S.C. §1301 *et seq.*), explicitly limits CAB jurisdiction to the regulation of "air transportation," defined as "interstate, overseas, or foreign air transportation or the transportation of mail, by aircraft." [49 U.S.C. § 1301(10)]. "Interstate air transportation", in turn, is defined in Section 1301(21) as "the carriage by aircraft of persons or property as a common carrier . . . by aircraft, in commerce between . . . (a) a place in any State. . ., or the District of Colombia, and a place in any other State. . . or the District of Columbia."

The carriage of "persons" between points in different States is "air transportation"; the carriage of persons between points in the same State is not. It is true that any carrier which provides, in any part, "interstate air transportation" is subject to certification or exemption; however, this cannot, in and of itself, give the Board jurisdiction to regulate totally intrastate service provided by a certificated carrier.

It can hardly be argued that the Congress, after going to such lengths to define the parameters of the Board's jurisdiction in terms of carriage of persons by aircraft across State lines, did not intend by such definitions to exclude CAB jurisdiction over intrastate air transportation, including intrastate rates.

Further, most of the economic regulatory provisions throughout the Federal Aviation Act are phrased in terms applicable only to "air transportation" (*i.e.* interstate). For example, Section 1371(a) requires the issuance of a CAB certificate of public convenience and necessity for any air

carrier to engage in "air transportation." Section 1373, dealing with tariffs of air carriers, provides that every "air carrier" must file rates and fares with the Board for "air transportation", and that no air carrier may receive a greater or different fare for such "air transportation." Pursuant to Section 1374, every air carrier must provide "air transportation" at "just and reasonable rates."

These and other provisions of the Federal Aviation Act evidence a scheme of regulation designed to promote a dual regulatory structure in the aviation field. This dual system of regulation — State and Federal — has existed, in the California markets, for the past 25 years and has specifically been afrirmed by the courts. *People v. Western Air Lines, Inc.*, 268 P.2d 723 (Calif. 1954), *appeal dismissed for want of a substantial federal question, Western Air Lines v. California*, 348 U.S. 859, 99 L.Ed. 677, 75 S.Ct. 87 (1954); *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W.2d 199, *cert. denied*, 400 U.S. 943, 27 L.Ed.2d 247, 91 S.Ct. 244 (1970); *Texas International Airlines, Inc. v. CAB*, 473 F.2d 1150 (D.C. 1972).[3]

Not only have the courts enforced the clear mandate of Congress to leave the economic regulation of intrastate air transportation to State authorities, but Congress has also confirmed, at least several times, its original decision to divide the economic regulatory responsibilities over air transportation between State and Federal authorities by

[3]In the *Texas International Airlines* case, the D.C. Circuit ruled that the CAB did not have the authority to regulate intrastate carriers stating that, "[n]othing in this definition [of air transportation in the Act] is directed at activities which merely affect interstate commerce." 473 F.2d at 1152. Yet, in the case at bar, the same Court has now ruled that the CAB can regulate intrastate operations, even where there is no proven effect on interstate commerce. The conflict is patent.

refusing to amend the Aviation Acts to place all such responsibilities in a Federal body.[4]

Yet, in spite of the overwhelming authority evidencing a Congressional intent to have both State and Federal regulation of the airline industry, the Court of Appeals, in one sweeping blow, has destroyed over 25 years of pervasive State regulation and has seen fit to take upon itself the legislative function of rewriting the Federal Aviation Act. Such an action must not be allowed to go unchecked for it threatens the basic structure of our governmental system.

II. THE COURT OF APPEALS HAS RENDERED A DECISION OF FIRST IMPRESSION WHICH MISAPPLIES THE *SHREVEPORT* DOCTRINE AND MISCONSTRUES THE FEDERAL AVIATION ACT

For the first time in the history of aviation regulation a Federal court has specifically ruled that the CAB has the inherent power to set intrastate rates in spite of a pervasive State regulatory structure. Allegedly, this power is to be exercised "when unjust discrimination results from an intrastate rate structure." [Decision of Court of Appeals, App. B at 13]. In application, however, the Court of Appeals has granted the CAB *carte blanche* preemptive authority over the intrastate rate-setting process.

The authority for this far-reaching power lies, according to the CAB and the Court of Appeals, in the language of the

[4]Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (Jan. 30, 1935) 237-239; 78th Congress: Lea-Bailey Aviation Bill introduced as H.R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H.R. 3420; Boren Bill, H.R. 4845; Reece Bill, H.R. 4848; 79th Congress: Lea Bill, H.R. 674; Johnson Bill, S.541; Lea Bill, H.R. 3383; 80th Congress: Wolverton Bill, H.R. 2337; 81st Congress: Brewster Bill, S.423; Johnson Bill, S. 445; Johnson Bill, S. 2435; See also 1944 *National Association of Regulatory Utility Commissioners Annual Proceedings*, 221; 1945 *Proceedings*, 299; 1946 *Proceedings*,-210; 1947 *Proceedings*, 128; 1948 *Proceedings*, 69; 1949 *Proceedings*,-166; 1950 *Proceedings*, 106.

Federal Aviation Act itself. The Court has ruled that 49 U.S.C. § 1374(b) explicitly gives the CAB *Shreveport*-type authority to regulate intrastate rates. Such an interpretation of Section 1374(b) belies the plain language of that provision and the underlying legislative history since Section 1374(b), on its face, only proscribes discrimination in "air transportation," defined in Section 1301(10) as "interstate air transportation."[5]

The Court of Appeals' attempts to twist the legislative history and judicial interpretation of Section 1374(b) so as to specifically promote the application of *Shreveport* authority is also an erroneous analysis. In the opinion below the Court states that:

> . . . the courts have repeatedly held that Section 1374(b) [49 U.S.C. § 1374(b)] of the Federal Aviation Act was modeled after the Interstate Commerce Act, the latter being an appropriate guide for construing the former, *Transcontinental Bus System v. CAB*. In addition, the legislative history of the Civil Aeronautics Act of 1938 indicates that Congress, although asked to do so, decided not to limit the application of the Shreveport doctrine in air transportation as it had done in highway transportation.

App. B at 13.

The Court's assertion that the anti-discrimination provisions were modeled after the Interstate Commerce Act may perhaps be true. However, that, in and of itself, does not mean that the provisions in each of the Acts in question are to be interpreted the same. As the court stated in *Commonwealth of Virginia v. CAB*, 498 F.2d 129, 134 (4th Cir. 1974), cited by the Court below:

---

[5]For full text of Section 1374(b) see App. J.

> It is, of course, true that the anti-discrimination provisions of the Federal Aviation Act are closely modeled on their counterparts in the Interstate Commerce Act, but that is not to say that the decisional precedents of one statute can be indiscriminately imputed to another.

Furthermore, *Transcontinental Bus System v. CAB*, 383 F.2d 466 (5th Cir. 1967), as well as the *Commonwealth of Virginia* case, did not even deal with the exercise of *Shreveport*-type authority over intrastate rates. Thus, the Court's emphasis upon these cases is misplaced.

In addition, it is imperative to note the basic distinction between Interstate Commerce Commission (ICC) authority over intrastate rates and CAB authority in the same sphere.

The *Shreveport* authority of the ICC to affect intrastate rates is derived from Section 3(1) of the Interstate Commerce Act [49 U.S.C. § 3(1)]. In certain respects, Section 3(1) of the Interstate Commerce Act does resemble, as the Court of Appeals alleges, Section 1374(b) of the Federal Aviation Act. Both define jurisdictional carriers' responsibilities to avoid acting in ways which unjustly discriminate against specified traffic. However, the similarities end there. Section 3 of the Interstate Commerce Act, as recognized in *Shreveport*, grants the ICC plenary authority over the carrier itself thereby allowing the Commission to remove any and all unjust discrimination.[6] The CAB's authority, however, is strictly limited to authority over the service performed, *i.e.* "air transportation." [49 U.S.C. § 1374(b)].[7]

---

[6]Section 3(1) pertains to "any common carrier subject to the provisions of this chapter."

[7]With the exception of authority to require air carriers to submit certain reports.

Thus it is evident that Section 3(1) of the Interstate Commerce Act does not speak of ICC authority to order a carrier to remedy discrimination *in interstate transportation* in the same manner that the Federal Aviation Act, in § 1374(b), speaks of CAB authority to remove discrimination "in air transportation." With plenary authority over the rail carriers themselves, the ICC could therefore order the carriers to remove any unjust discrimination caused even by activities outside the normal jurisdiction of that agency — but only for the purpose of removing that discrimination. See *North Carolina v. United States,* 325 U.S. 507, 510-511, 89 L.Ed. 1760, 1765-1766, 65 S.Ct. 1260 (1945).

The CAB has no such authority over the carriers, especially in its rate making activities. Rather, § 1374(b), in accord with the basic demarcation of CAB authority set forth in the definition in § 1301(21), limits the CAB's jurisdiction to remove discrimination to those instances in which the discrimination is "in air transportation." An intrastate rate charged by an interstate carrier is not "in air transportation."

Furthermore, the CAB's argument, apparently given great weight by the Court, to the effect that Congress considered and rejected an amendment to the Federal Aviation Act which would preclude *Shreveport* authority is patently meritless since legislative history is primarily of value only where the language of the act is ambiguous. *Caminetti v. United States,* 242 U.S. 470, 485, 61 L.Ed. 442, 453, 37 S.Ct. 192 (1917). In this case it is just as logical to assume that Congress felt such an amendment to be superfluous in light of the CAB's clear jurisdictional limitations to matters involving "air transportation." Moreover, it is well established that "it will not be presumed that a federal statute was intended to supersede the exercise of the power of the State unless there is a clear manifestation of intention to do so." *Schwartz v. Texas,* 344 U.S. 199, 202, 97

L.Ed. 231, 235, 73 S.Ct. 232 (1952). Mere inference, as the Court used below, is not sufficient.

In addition to the aforementioned reasons why the Court of Appeals' decision granting the CAB *Shreveport* authority is erroneous, another primary reason remains — the *Shreveport* case itself.

In the *Shreveport* case [*Houston and Texas Ry. v. United States*, 234 U.S. 342, 58 L.Ed. 1341, 34 S.Ct. 833 (1914)], the Supreme Court held that the ICC was authorized to eliminate differences between rates approved by the ICC and a lower intrastate rate when the relations between such rates resulted in an undue preference for one locality over another and a resulting burden on interstate commerce.

The instant case, however, does not involve a question of intrastate fares favoring intrastate persons or localities as against interstate persons or localities as was the issue in *Shreveport*. In *Shreveport*, there was an undue preference in favor of intrastate traffic and against interstate traffic. This case involves alleged unjust discrimination *between interstate passengers* — the *knowledgeable interstate* passenger is receiving a favored lower rate while the *unknowledgeable interstate* passenger pays the higher rate. This is not the type of discrimination *Shreveport* has been held to reach.[8]

[8]The Court below has attempted to characterize the problem herein as one involving a preference for intrastate traffic as against interstate traffic [Decision of Court, App. B at 11]. However, this assertion disregards the entire record. The CAB specifically found that, "the more knowledgeable interstate passengers moving in these markets are routinely paying the lower intrastate fare, leaving only those interstate travelers who are unaware of the lower fare . . . to pay the higher fares." [CAB Order, App. C at 25]; ". . . because the carriers are unable or unwilling to distinguish all interstate passengers moving over the intrastate segments, some are charged the high interstate fares for the intrastate segment while others are charged the lower intrastate fares." [App. C at 27]. Thus it is clear that the problem here does not arise because of a *Shreveport*-type discrimination, but is due to a CAB enforcement problem.

III. THE RULING BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT HOLDING THAT PREEMPTION IS A REMEDY OF LAST RECOURSE

It is well established that if State legislation or regulatory policy is not in conflict with or repugnant to the Congressional scheme, the States are *not* preempted from legislating in those areas. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nevada, 1968) *aff'd* 396 U.S. 556, 24 L.Ed.2d 746, 90 S.Ct. 749 (1970).

In *Savage v. Jones*, 225 U.S. 501, 56 L.Ed. 1182, 32 S.Ct. 715 (1912) the Supreme Court, at 553, stated:

> But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.

This Court has reiterated the above holding time after time. In *Schwartz v. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952) the Supreme Court noted that:

> If Congress is authorized to act in a field it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.
>
> 344 U.S. at 202-203, 97 L.Ed. at 235.

In *Head v. New Mexico Board*, 374 U.S. 424, 10 L.Ed.2d 983, 83 S.Ct. 1759 (1963), the Supreme Court, in discussing

preemption under the Communications Act of 1934, stated (at 429-430):

> In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Communications Act. "[T]he 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belong to it as to exclude the State, must be answered by a judgement upon the particular case.' Statements concerning the 'exclusive jurisdiction of Congress' beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 366 U.S. 725, 731, 93 L.Ed. 1005, 1010, 69 S.Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L.Ed. 3, 10, 12, 58 S.Ct. 87. *In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same areas, (or) evidence of a Congressional design to preempt the field." Florida Avocado Growers v. Paul*, 373 U.S. 132, 141, 10 L.Ed.2d 248, 256, 83 S.Ct. 1210 (Emphasis supplied.).

The above cases make it imminently clear that preemption of valid State authority must not be allowed unless the nature of the regulated subject matter permits no other conclusion or the Congress has unmistakably so ordained. Preemption is a remedy of last recourse.

In the leading case of *North Carolina v. United States*, 325 U.S. 507, 89 L.Ed. 1760, 65 S.Ct. 1260 (1945), the Supreme Court set out certain "guiding principles" for the application by the ICC of *Shreveport* authority under Section 13(4) of the Interstate Commerce Act (*i.e.* the codification of *Shreveport, North Carolina v. U.S., supra*, note 3, at 513, 89 L.Ed. at 1766). There the Court said:

> Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. American Exp. Co. v. South Dakota, 244 U.S. 617, 625, 61 L.Ed. 1352, 1358, 37 S.Ct. 656, PUR 1917 F. 45. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that *Interstate Commerce Commission orders giving precedence to federal rates must meet a "high standard of certainty."* Illinois C.R. Co. v. State Pub. Utilities Commission, 245 U.S. 493, 510, 62 L.Ed. 425, 438, 38 S.Ct. 170, PUR 1918C 1279. *Before the Commission can nullify a State rate, justification for the "exercise of the federal power must clearly appear."* Florida v. United States, 282 U.S. 194, 211, 212, 75 L.Ed. 291, 301, 302, 51 S.Ct. 119. See also Yonkers v. United States, 320 U.S. 685, 88 L.Ed. 400, 64 S.Ct. 327. *And the intention to interfere with the state's rate-making function is not to be presumed,* Arkansas R. Commission v. Chicago, R.I. & P.R. Co., 247 U.S. 597, 603, 71 L.Ed. 1224, 1228, 47 S.Ct. 724; . . . .

North Carolina v. United States, supra, at 511, 89 L.Ed. 1765, 1766. (Emphasis added.)

From the above, it is apparent that a regulatory agency similar to the ICC faces a high burden of proof which it must meet prior to the control of intrastate rates. As the Supreme Court stated in summarizing the above cases:

> . . . the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence of each element essential to the exercise of that power by the Commission.
>
> *North Carolina v. United States, supra,* 325 U.S. at 511, 89 L.Ed. at 1766.

If the ICC, which enjoys greater latitude in the intervention into intrastate affairs than most agenices, must make its justification for such intervention "definitely and clearly apparent," then can it be presumed that the CAB must meet a lesser standard? The "high standard of certainty" has not been satisfied in the instant case.

In the *North Carolina* case, the Supreme Court ruled that the mere existence of a disparity between rates on intrastate and interstate traffic does not authorize the ICC to enter the field properly belonging to a State commission and interfere with lawfully established intrastate rates, *North Carolina v. United States, supra,* at 512, 514, 516, 89 L.Ed. 1766, 1767, 1768. Accord, *Florida v. United States,* 282 U.S. 194, 212, 75 L.Ed. 291, 302, 51 S.Ct. 119 (1931); *Arkansas Railroad Commission v. Chicago, R.I. & P.R. Co.,* 274 U.S. 597, 599, 71 L.Ed. 1224, 1226, 47 S.Ct. 724 (1927). Yet, here, the Court of Appeals has authorized such usurpation of State authority.

Not only did the Court of Appeals authorize an invalid preemption, but it did so in the face of many more equitable and fair remedies which would not necessitate the unlawful incursion into valid State authority. The basic inequity of the Court's decision is most glaring in its effects

upon those intrastate passengers who fly in the California monopoly markets — *i.e.* those markets where a CAB-certificated carrier holds a monopoly position. The obvious result of the Court's decision will be substantial fare increases to intra-California travelers on the monopoly routes. Moreover, the effect of the Court's decision is to remove the intrastate California traveler from effective participation in proceedings to determine the justness and reasonableness of intra-California rates and services provided by CAB-certificated carriers.

The Court defends its ruling by relying upon the principles established in the *Domestic Passenger Fare Investigation* (DPFI), stating that the major premise of DPFI rate standards is nationwide fare equality. The Court expresses its concern that there should be no passenger subsidizing another passenger in another market. However, this reasoning completely ignores the fact that the CAB now looks upon the DPFI with displeasure. Investigations are being conducted with a view toward *less* fare equality, not more.[9]

The NARUC submits that the decision of the Court below is unduly restrictive. The Court could easily have focused upon solutions that were less restrictive and less disruptive of legitimate State interests in the economic regulation of intrastate rates.

It is quite evident that this proceeding basically involved a CAB enforcement problem. The Board itself

---

[9]On August 25, 1978, the CAB released its Final Rule and Order in the DPFI, Docket Nos. 21866-4, 21866-9, 31290, 30891. As part of its Final Rule, the Board eliminated the uniform fare requirement relied upon by the Court of Appeals. [See esp. Part 399 — Statements of General Policy, Domestic Passenger-Fare Level Policies, Domestic Passenger-Fare Structure Policies, Discount Fare Policy, Amendment No. 59 to Part 399 Docket Nos. 31290, 30891]. Also see CAB proceedings ADR-353, PDR-52, PSDR-51.

acknowledged that it was simply trying to eliminate what it deemed to be unjust rate discrimination solely among interstate passengers; the CAB was attempting to solve the problem of double ticketing. Rather than preempting State regulation, the CAB could have instituted procedures prohibiting double ticketing including the publication of penalties and strict enforcement. Another solution, also far superior to ignoring Congressional intent and destroying dual regulation, would have been adoption of the Administrative Law Judge's opinion, thus maintaining the status quo.

Finally, the CAB, as well as the Court of Appeals, could have easily ruled that interruptions in the interstate journey non-incidental to the transportation provided will break the interstate movement whether the planned interruption is communicated to the carrier in advance or not. Thus, Mr. Nader would be considered an intrastate passenger for the San Francisco to Los Angeles flight and he would therefore pay the intrastate fare. This solution would establish a single fare level, end any unjust discrimination, and preserve the Congressionally mandated dual regulatory structure. Legal authority for such a solution is plentiful. [See *Brown v. Houston*, 114 U.S. 622, 29 L.Ed. 257, 15 S.Ct. 1091 (1885); *Susquehanna Coal Co. v. City of South Amboy*, 228 U.S. 665, 57 L.Ed. 1015, 33 S.Ct. 712 (1913); *Bacon v. Illinois*, 227 U.S. 504, 57 L.Ed. 615, 33 S.Ct. 299 (1913). See also "The CAB California-Texas Fare Case: An Intrastate Stopover Takeover?", 42 *Journal of Air Law and Commerce* 675 (July 1977)].

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

PAUL RODGERS
General Counsel

CHARLES A. SCHNEIDER
Assistant General Counsel

WILLIAM R. NUSBAUM
Deputy Assistant General Counsel

National Association of Regulatory
Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

September 18, 1978